No. 76-1184

Supreme Court of the United States

October Term, 1977

E. I. Malone, Commissioner of Labor and Industry for Minnesota,

Appellant,

v.

White Motor Corporation and White Farm Equipment Company,

Appellee.

On Appeal from the United States Court Of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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Appellant,

v.

WHITE MOTOR CORPORATION AND WHITE FARM EQUIPMENT COMPANY,

Appellees.

On Appeal from the United States Court Of Appeals for the Eighth Circuit

MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations hereby respectfully moves for leave to file the attached brief *amicus curiae* in the instant case as provided for in Rule 42 of the Rules of this Court. Counsel for the parties have not consented to the filing of that brief.

INTEREST OF THE AMICUS CURIAE AND ISSUES TO BE COVERED

The AFL-CIO is a federation of 102 national and international unions having a total membership of approximately 13,500,000 men and women. Establishing economic security through collectively bargained pension plans has long been a major concern of the AFL-CIO and its affiliates. However,

while this case involves problems concerning such plans, the precise legal issue here presented—the degree to which states may come to the aid of beneficiaries of terminated collectively bargained employee benefit programs to protect their pension rights—cannot recur. For, the Employee Retirement Income Security Act of 1974, now effective but not applicable to this case, both provides extensive protection to such plans and makes plain that state action in the area is, with certain specified exceptions, preempted. Our concern is, therefore, primarily with the implications of the decision below for the labor law preemption doctrine, both generally and as it pertains in particular to other state statutes setting minimum protective standards for employees.

This case has been presented by the parties as concerning the present vitality of *Teamsters* v. *Oliver*, 358 U.S. 283, in which this Court held that the states may not ordinarily apply their own law to hold invalid agreements reached by unions and employers upon mandatory subjects of bargaining. *Oliver* appears to us to have established a valid and necessary rule faithful to the concept underlying the national labor policy favoring free collective bargaining. We were originally prepared, therefore, to support the position of appellees despite the immediate consequence of that position in this case.

This intention was premised, however, upon the assumption that the court of appeals' explication of the history of the Welfare and Pension Plan Disclosure Act of 1958 was accurate. For the *Oliver* principle, like any other general preemption principle, is not and ought not to be absolute; contrary explaantions of Congressional intent must be given effect. Closer investigation of the WPPDA and its history demonstrate that, while the issue is close, it does seem that

Congress' purpose in 1958 to permit—indeed promote—state regulation of welfare and pension plans was broad enough to encompass the sort of substantive regulation Minnesota undertook in 1974.

In Part I of our brief we therefore develop the implications for this case of the Congressional intent expressed in the WPPDA as we understand that intent and argue that the decision below should be reversed. Then, in Part II, we assume that the WPPDA is not relevant here and explore the proper application of the *Oliver* principle to the facts presented in this case. We there suggest a narrower basis for affirmance of the judgment below.

In our brief we do not address broad questions concerning federal labor law preemption of state protective regulation affecting collective agreements debated by appellant and appellees, because we are convinced that there is no need for this Court to consider them to decide either this case or analogous cases likely to arise in the future. For as to almost every kind of protective state legislation which has the effect of limiting th ebargain which can be struck between employers and unions, there is now a federal statute of both setting minimum national substantive standards and indicating whether and to what degree states may act in related areas. These federal statutes, of which WPPDA appears to us to be one, are, we point out, as much a part of the federal labor policy as the NLRA. And, as this Court explained in *Boys Markets* v. *Clerks Union*, 398 U.S. 235, sensitive statutory interpretation requires that the NLRA and other federal labor statutes be "accommodated" to each other even when they appear to point in opposite directions. We argue that the federal-state relationship envisioned by statutes similar to WPPDA there-

fore ought to be given effect even where the intent to permit application of state law to collective agreements is not express. The harm to the NLRA free collective bargaining principle will be minimal where there is already federal regulation as to a facet of the employment relationship, while complex Congressional schemes for allocating regulatory authority between the federal government and the states would be upset if the usual NLRA preemption rules applied.

In the final section of our brief we develop the point that where the NLRA is the only statute in the picture, *Oliver* plainly and properly precludes that statutes such as that here from changing the terms of collective agreements in force. Since the parties bargained for an over-all package, it would be an intolerable interference with the free collective bargaining envisioned by federal law to permit the states without Congressional sanction to change that bargain in part.

CONCLUSION

For the above stated reasons, this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,
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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) contingent on the granting of the foregoing motion by the AFL-CIO for leave to file a brief as *amicus curiae.*

INTRODUCTION AND SUMMARY OF ARGUMENT

This case concerns whether a state statute regulating the termination of an employee pension program in a manner that invalidates certain limitations stated in a collective agreement on the employer's liability in the event of termination may be given effect. The parties have presented

the case as one raising broad questions concerning the present vitality of *Teamsters Union* v. *Oliver*, 358 U.S. 283, in which the Court held:

> "Federal law created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty, *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448; and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide, * * *. We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. * * *. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State." (*Id.* at 296.)

In effect, the Court is being asked either to abandon the perception of *Oliver* that state limitations upon the terms of a collective agreement can as effectively hamper the federal labor policy as state intrusion into the means of bargaining,[1] or the use of economic weapons, or to view

[1] For example, the State maintains that only state laws affecting the bargaining *process*, and not those limiting the substance of a collective agreement are pre-empted; *Oliver* is distinguished on the ground that in that case there was "a direct and material interference with the bargaining process". (Brief for Appellants (hereafter "App. Br.") at 21.) The State alternatively distinguishes *Oliver* on the ground that "the state law challenged therein was an antitrust statute, [and] '[s]tate antitrust statutes present unique problems in the area of labor preemption.' " (App. Br. 23). The first suggestion is belied by the plain words of *Oliver*, quoted

Oliver as stating an all-encompassing pre-emption principle mandating that no state laws affecting the terms of collective agreements may ever be given effect.[2]

We see no need for this Court to choose between these

in the text, which show that state interference with the *terms* of a labor agreement is precisely what is generally outlawed; the second distinction amounts to an invitation to restrict *Oliver* to its facts. The United States, appearing as *amicus curiae*, seems at first to accept *Oliver's* holding that state laws directly affecting mandatory subjects in collective agreements may be pre-empted in some circumstances but, it then relies upon a broad construction of the heretowould appear to swallow the rule. In apparent recognition that this broad view of the police power exception engulfs *Oliver*, the United States offers an exception to the exception—if the purpose of the state statute is "specifically to adjust relationships in the world of commerce" the statute is invalid. (U.S. Br., at 18.) But, if that approach were followed, the state statute here would fall, because Minnesota's pension regulation does "specifically adjust relationships in the world of commerce"; indeed, that regulation has application only to the employee/employer relationship and thus directly implicates labor law interests. Thus, while the United States argues for reversal of the decision below, its theory suggests the opposite result. This shows that the government's argument is so convoluted, vague and internally inconsistent that it confuses the issues rather than clarifies them.

[2] This is the proposition advanced by White Motor Corporation—that "no state which would limit the agreements which could be reached by employers and unions on mandatory subjects of bargaining can *ever* be effective." The Court of Appeals appeared to agree, perceiving in this Court's opinions "the * * * proposition that a state cannot modify or change an otherwise valid and effective provision of a collective agreement." (Pet. App. 20.)

two disturbing alternatives.[3] For, while the reasoning of *Oliver* seems to us to be compelling, the prohibition on state action stated by the Court is qualified by the rule that the states *may* act where "[t]he solution worked out by the parties was * * * one of a sort which Congress has indicated may be left to prohibition by the several States." (358 U.S., at 296.) And, in *Boys Markets* v. *Clerks Union*, 398 U.S. 235, 250, this Court explained that "the total corpus of pertinent law and * * * policies" is to be considered in explicating the federal labor policy. Here, and in many other areas in which parallel problems are likely to arise, the Congress has itself enacted federal legislation affecting a particular aspect of the employee/employer relationship, and has included in such legislation provisions describing the power of the states to act as to that same general facet of labor relations. As to such matters, it is our position that, in accord with the *Boys Markets* approach, the problem is properly viewed as one of accommodating the general NLRA pre-emption rule stated in *Oliver* to later express indications by Congress that "the solution worked out by the parties" was indeed "left to prohibition by the several states". And, in our view, proper accommodation requires giving effect to the federal-state regulatory rela-

[3] The position of both the State and the United States could, taken at face value, permit states actually to set directly and entirely the wages and working conditions of all employees in the state, precluding any collective bargaining whatever. On the other hand, if the unyielding proposition pressed by appellees and adopted by the court below were correct, the effect would be equally profound. For there are, in nearly every state, statutes which provide basic protection to employees in such diverse areas as minimum wages, maximum hours, racial and sexual discrimination, health and safety rules and disability insurance.

tionship envisioned in specific substantive enactments as long as the state law in question is consonant with the federal labor policy as expressed in the total corpus of pertinent labor statutes.

In Part I of our Argument, therefore, we first demonstrate that the approach of *Oliver*—setting a basic rule of pre-emption but recognizing that a specific Congressional indication to the contrary must prevail—is but an example of the general analysis this Court has used in the labor law pre-emption area. We then discuss appellees' argument that unless it is apparent from the NLRA itself (or from a later statute expressly countermanding the *Oliver* principle as to a particular facet of labor relations) that Congress intended to allow state regulation in that area, all of later statutes in which Congress appeared to permit state activity are to be ignored. Applying the *Boys Markets* approach, we show that the "total corpus of pertinent law and * * * policies" applicable here includes not only the NLRA but a set of statutes in which Congress undertook some federal regulation of an aspect of the employer/employee relationship and indicated at the same time whether and to what degree states could act in the same general area. Reconciling those later statutes to the NLRA requires, we argue, that the federal-state relationship envisioned as to specific protections for employees should be given effect as long as the state statute in question is consistent with the federal labor policy as expressed in the NLRA or other relevant federal labor law in question.

We then address the application of the principles developed to this case. The federal Welfare and Pension Plan Disclosure Act of 1958 ("WPPDA"), in force when this case arose, did in our view, indicate an intent not only to

permit but to encourage state regulation of employee benefit programs; the court of appeals' conclusion to the contrary appears to be based on a misunderstanding both of the state law here at issue and of the federalism scheme envisioned by Congress in the WPPDA. While the extent of Congressional permission under the WPPDA is somewhat less clear than in the other statutes discussed, we believe it to be sufficiently broad to embrace the state legislation here at issue.

In Part II we discuss an alternative approach, applicable only if the Court disagrees with our assessment of the impact of the WPPDA. In that event we argue that the judgment should be affirmed on the narrow ground that even state protective statutes may not affect *existing* collective agreements. Whether or not the national labor policy could tolerate a system presupposing that bargaining is to take place against a background of differing state laws affecting mandatory subjects, application of such laws to existing agreements is intolerable in that it directly imposes a bargain rather than merely setting limits within which the negotiations occur.

ARGUMENT

I. 1. In large part, this Court's approach to various problems concerning pre-emption of state regulation by the NLRA and the policies underlying it has been dictated by "the necessity to act without specific Congressional direction" and by the understanding that it was not the Congress' intent to "declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions; obviously much of this is left to the states." (*Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 289.) Therefore, as to those pre-emption problems upon which there were only the basic parameters of the NLRA to inform the determination whether a particular matter was "left to the states," the Court, after some experimentation with various approaches, determined to set broad, general principles, with delineated classes of exceptions, in order to simplify decision making by state and federal courts to the extent possible. (*Lockridge, supra*, 403 U.S., at 290-291, 302; see also *Farmer* v. *Carpenters*, 430 U.S. 290, *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132).

At the same time, this Court has always recognized that its decisions in the area of labor law pre-emption "[do] not state * * * constitutional principles; [they] merely rationalize the problems of coexistence between federal and state regulatory schemes in the field of labor relations * * *." (*Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103). Thus, "[t]he purpose of Congress [remains] the ultimate touchstone. Congress under the Commerce Clause may displace state power * * * or it may * * * indicate a purpose to let state regulation be imposed on the federal regime." (Id. at 103-104.) Even where it appears that to give effect to state regulation might conflict with general presuppositions believed to underly the NLRA, state law is to be given effect where there is "a conflict sanctioned by Congress with directions to give way to state laws * * *." (*Id.*, at 103.)

Oliver, supra, is entirely consistent with this mode of decisionmaking in the labor law pre-emption area. Because Congress had not specifically addressed the question whether, and to what degree, state law may impinge upon the terms parties to a collective bargaining agreement may reach on mandatory subjects of bargaining, the Court extrapolated from the basic NLRA purpose of promoting free collective bargaining the general rule that "state policy [may not limit] the solution that the parties agreement can provide to the problems of wages and working conditions." (*Oliver, supra*, 358 U.S., at 296). However, the Court recognized that the general rule would not apply where "[t]he solution worked out by the parties was * * * one of a sort which Congres has indicated may be left to

prohibition by the several states." (*Id.*, at 296). The question, then, is whether Congress has so indicated with regard to the pension regulation here at issue.

2(a) The district court in this case, in holding that the Minnesota pension enactment was not pre-empted by federal labor policy, relied in part precisely upon an explicit Congressional indication that "the solution worked out by the parties was * * * one of a sort which * * * (is) left to prohibition by the several states." For, that court noted that the Welfare and Pension Plans Disclosure Act of 1958 ("WPPDA"), since superseded by a more comprehensive federal enactment but in effect when the pension plan here at issue was terminated, appeared expressly to permit state regulation of employee benefit programs, and that the legislative history of that Act demonstrates that the intent was not only to permit but to encourage such legislation.

The court of appeals disagreed with the district court as to the significance of the WPPDA, for it did not perceive that the Congress in that statute expressed an intent to permit state regulation of the type here at issue. For reasons we discuss later (*infra*, at 24) we believe the court of appeals may well have misunderstood both the character of the state law and the extent of Congressional permission to the states in the WPPDA.

The Company, however, appears to maintain that even if it were plain that Congress in 1958 contemplated plenary state regulation of employee pension plans, that intent could not be effective because the expression of Congressional intent as regards the power of states to regulate pension plans was not an integral part of the NLRA and did not expressly cede power to affect collective agreements:

> "The Disclosure Act became law in 1958. At that time * * * the National Labor Relations Act had been in effect for many years. * * *
>
> Consequently, when the Disclosure Act was enacted, states did not have the power to change substantive terms of collective bargaining agreements, and the Disclosure Act did not cede power to the states." (Response of Appellees to Memorandum for the United States as Amicus Curiae, at 8).

While this analysis has a conceptual neatness about it, it disregards the duty of courts "to accommodate all statutes pertinent to the decision of cases before them. (*Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 220 (Brennan, J., dissenting).) "Statutory interpretation requires [that] * * * consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." (*Boys Markets* v. *Clerks Union*, 398 U.S. 235, 250).

In *Boys Markets*, the Court applied this approach to limit the application of "[t]he literal terms of § 4 of the Norris-LaGuardia Act * * * to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration." (*Id.*, at 250). It did so because:

> "[a]s labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes. This shift in emphasis was accomplished, however, without extensive revision of many of the older enactments, including the anti-injunction section of the Norris-LaGuardia Act. Thus it

became the task of the courts to accommodate, to reconcile the older statutes with the more recent ones." (*Id.* at 251).

(b) Here, the "total corpus of pertinent law" includes not only the NLRA and the WPPDA but, in addition, a set of federal statutes which regulate aspects of the employee-employer relationship which would otherwise be a mandatory subject of collective bargaining and at the same time relegate to the states some power, often circumscribed by express limitations, to regulate in the same area as well. These statutes provide the context for understanding the place of the WPPDA in the federal scheme and we therefore review them before turning to our discussion of that Act.

The first of these enactments, the Fair Labor Standards Act, was passed only three years after the NLRA. In words quite similar to those used in the WPPDA,[4] the FLSA expressly permitted state regulation of minimum wages and maximum hours, as long as the state standards were more protective than the federal standards. Such state regulations could, of course, have the effect of invalidating a collective agreement if that agreement provided for wages less than or hours longer than state law requires. Nonetheless,

[4] 29 U.S.C. Section 218(a) reads: "No provision of this chapter or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter or a maximum workweek lower than the maximum workweek established under this chapter, and no provision of this chapter relating to the employment of child labor shall justify noncompliance with any Federal or State law or municipal ordinance establishing a higher standard than the standard established under this chapter."

Congress in 1938 saw no fundamental inconsistency between the scheme of free collective bargaining just established and the setting by the states of certain specified minimum protective standards for employees in a general area in which there was federal regulation as well.

Between 1938 and 1958 there was little federal legislation of general application substantively affecting the terms and conditions of employment in a way likely to affect the substance of collective agreements. But:

> "[W]ithin a few years [after 1960] there began an ever increasing quantity of substantive federal regulation of the terms and conditions of employment * * *. In 1963, there was the Equal Pay Act; in 1964, Title VII of the Civil Rights Act; in 1970, the Occupational Safety and Health Act and Title III of the Consumer Credit Protection Act limiting the right of an employer to discharge because of garnishment. In 1974, the Employee Retirement Income Security Act (ERISA) was passed—problems created by the interrelationships between that Act and collective bargaining agreements are just beginning to be felt." (Feller, *Arbitration: The Days of Its Glory Are Numbered,* 2 Industrial Relat. L.J. 97, 105 (1977, footnotes omitted))

To this list could be added the Age Discrimination Act of 1967, Title IX of the Education Amendments of 1972, and the various mine safety and health protection acts. Each of these statutes substantively affect the terms of collective agreements on mandatory subjects of bargaining by setting minimum standards of protection for individual employees which may not be breached.

In enacting these statutes, the Congress was careful, as

it had been in the FLSA, to spell out whether and to what degree state regulation affecting matters touched by the new federal legislation was permitted. In some instances, it is clear that Congress intended, and indeed encouraged, state activity; in others, state activity was permitted only if specified conditions were met; and in still others, Congress expressly pre-empted most state regulation, even as to matters not touched by the federal statute.

For example, the Civil Rights Act of 1964, of which Title VII prohibiting employment discrimination based upon race, sex, religion or national origin was a part, contained a general declaration that "nothing contained in any title of this Act shall be construed as * * * [excluding] * * * State laws on the same subject matter * * * unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." (Section 1104 of the Civil Rights Act of 1964, 29 U.S.C. Section 2000h-4). In Title VII itself, Congress made clear that it intended to do more than simply not disturb state regulation. In states which had legislation prohibiting employment discrimination of the kind covered by the Act, complainants were affirmatively required to pursue their state remedies first (Section 706(c) and (d) of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(c) and (d)); and provision was made for cooperation between the Equal Employment Opportunity Commission and "state and local agencies charged with the administration of State fair employment practices laws * * *." (Section 709(b) of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-8(b); see also Section 709(d), 42 U.S.C. Section 2000e-8(d)). Thus, Congress made state activity in the area of fair employment practices an integral part of the Title

VII scheme.[5] It did not, however, spell out explicitly that states could exercise power in this area even when the terms of collective agreements were affected. On appellants' reasoning, such an express provision would be necessary to counteract the earlier pre-emptive effect of the NLRA. But, to take this wooden view would be to imply an exception into the procedural provisions of Title VII for fair employment practices complaints which would affect mandatory subjects of bargaining; otherwise, complainants would be required to apply to a state agency which is without power to deal with their problem. Plainly, Congress could not have intended such an exception, which would create chaos in the procedural format of Title VII. Rather, Congress meant to permit state regulation in this area regardless of whether collective agreements are effectual.

The Occupational Health and Safety Act of 1970 is another Act in which Congress created federal regulation with a potential effect on mandatory subjects of bargaining; plainly, health and safety matters involve "working conditions". Yet the health and safety protections established

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[5] The Age Discrimination Act of 1967 is similar: it provides that "[n]othing in this [Act] shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age * * *". (Section 14 of the Age Discrimination Act of 1967, 29 U.S.C. Section 633). It then specifies that no lawsuit may be filed under the federal act until sixty days (or, in the first year after a state statute's effective date, one hundred and twenty days) after proceedings have commenced under state law but that, once commenced, the federal action shall supersede any state action (Id.). Thus, as in Title VII, some exhaustion of state remedies is required; and, as in Title VII, there is no exception for actions which involve mandatory subjects of collective bargaining.

by the Act may not be countermanded by the terms of a collective agreement. Once again, Congress spelled out the role of the states with regard to matters related to the federal legislation: the states were free to regulate with regard to health and safety issues as to which there were no federal standards but as to those matters where there were such standards, they could act if specifically permitted to do so by the Secretary of Labor after demonstrating compliance with enumerated requirements. (Section 18, OSHA, 29 U.S.C. Section 667).[6]

[6] Section 18, OSHA, 29 U.S.C. 667 reads in part:

(a) Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards

(b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

Conditions for approval of plan

(c) The Secretary shall approve the plan submitted by a State under subsection (b) of this section, or any modification thereof, if such plan in his judgment—

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655 of this title which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in section 657 of this title, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

For other federal legislation which provides for the possibility of state regulation in the absence of federal standards, see the Consumer Credit Disclosure Act, 15 U.S.C. Section 1601, 1610; and the Coal Mines Health & Safety Act, 30 U.S.C. Section 801, 953, amended by P.L. 95-164, 91 Stat. 1320(c)(1).

Once again, state action was made an integral, although regulated, part of the federal scheme; once again, there was no difference suggested between state regulation which could affect collective agreements and other state regulation. Yet, once again, while the Congressional intent was

quite clear, there was no express provision negating any pre-emptive effect of the NLRA. Congress did prohibit certain state activity, but only that which was not pursuant to an approved state plan.[7] To impose a general NLRA pre-

[7] Similarly in *N.Y. Telephone Co.* v. *N.Y. Dept. of Labor*, 96 LRRM 2921, C.A. 2, 1977, the court, while conceding that "a positive expression of Congressional intent is lacking" with respect to the preemptive effect of federal labor laws on state laws dealing with payment of unemployment benefits to strikers, 96 LRRM at 2923, found that:

> "* * * review of the relevant legislative history discloses no clear preemptive intent; indeed, virtually all the evidence is to the contrary. As mentioned above, the question whether striking employees should be afforded unemployment compensation has been a significant political issue since the early 1930s. In 1935, at a time when Congress sought to encourage the States to enact unemployment compensation statutes, New York was in the forefront, and its law granted compensation to strikers. For over forty years, Congress has been aware of the issue in general, and of New York's program in particular. "Congressional awareness, the availability of opportunities to act, and Congressional action in closely related matters," Grinnell, supra, 475 F.2d at 454, 82 LRRM at 2990, are all relevant in trying to determine Congress' intent, and all are present here. Moreover, their probative value increases over time. A long-standing practice "is not something to be lightly cast aside." Walz v. Tax Commission, 397 U.S. 664, 678 (1970). Accordingly, we hold that, notwithstanding the general rule that State statutes which touch or concern labor relations should be neutral, Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission, supra, 427 U.S. at 149-50, 92 LRRM 2881, and despite the otherwise broad preemptive scope of the federal labor laws, Congress has not expressed an intent to preempt State unemployment compensation laws that provide benefits to strikers. Quite to the contrary, it has evinced an intention to leave the State free to regulate in this area. Therefore, the conflict between New York's statute and the broad federal policy of free collective bargaining does not render the State statute unconstitutional. The conflict is one which Congress has decided to tolerate." 96 LRRM at 2926.

emption notion upon this comprehensive scheme would, as with Title VII, do violence to a well-considered decision about the appropriate distribution of power between the federal and state governments as regards a delineated area of employer/employee relationships.

Illustrative of a Congressional decision largely to supersede state power in another such area is the Employee Retirement Income Security Act of 1974 ("ERISA"), the federal statute which replaced the WPPDA, but which is not applicable to the present case. Section 514 of ERISA, 29 U.S.C. Section 1144, expressly pre-empts, with certain exceptions, "any and all State laws insofar as they may now or hereafter be related to any employee benefit plan described in Section 1003(a) of this title and not exempt under Section 1003(b) of this title". Thus, unlike the other statutes surveyed, ERISA does not incorporate state regulation as part of the federal scheme; indeed, it pre-empts state action even as to matters not federally regulated. But, even in ERISA Congress evidenced an intention to allow state activity of certain kinds in areas related to the federal legislation—namely, as pertinent here, state activity with regard to "any cause of action which arose, or act or omission which occurred, before January 1, 1975;[8] also per-

[8] The parties seem to agree that, had the events which precipitated this lawsuit occurred after January 1, 1975, the Minnesota statute would be ineffective. This delay is consonant, of course, with the recognition that such state regulation was expressly sanctioned by the predecessor federal statute, the WPPDA. Since the new federal regulatory scheme could not go into effect immediately, it was appropriate to permit that state activity to continue for a short period.

mitted was state regulation pertaining to certain employee benefit programs, including workmen's compensation, unemployment compensation and disability insurance. (See Section 41(b), ERISA, 29 U.S.C. Section 1003(b), incorporated into Section 514). With regard to these exceptions, there was no different treatment for collective agreements nor was there an express permission to the states to legislate in a way which affected the substance of such agreements. Nonetheless, the intent to permit state activity is plain.

Thus, the pattern which has been established is that when Congress determines to regulate, in whole or in part, a substantive aspect of employee-employer relationships, it at the same time gives careful thought to whether states may legislate in the same general area; it then spells out its decision in a section of the federal statute, often making careful distinctions between those areas into which the states may intrude—indeed, are encouraged to intrude—and those from which they are precluded. Without disturbing the holding of *Oliver*—which expressly recognized that a Congressional purpose to sanction state regulation is to be given effect—it is possible to "accommodate", as *Boys Markets* directs, the rule of NLRA pre-emption of state laws invalidating terms of a collective agreement. For, where Congress has enacted federal regulation in an area concerning which employers and unions are directed to bargain, it has necessarily altered the usual freedom to bargain by directing that the bargaining must conform to established limits. In those areas, therefore, the freedom the NLRA ordinarily grants has necessarily been to some degree disturbed because of a perceived countervailing public policy requiring affirmative governmental protection to

employees. Allowing state regulation in this situation as well may be an incremental increase in the degree to which bargaining is limited, but it does not entail intrusion into an area of employee/employer relationship otherwise entirely free from regulation.

Further, as in *Boys Markets,* this mode of accommodation contains inherent protections which assure that the fullest possible scope is given to each of the policies involved without infringing in any central way upon countervailing concerns. For, the scope of state regulation permitted would necessarily be limited to that consistent with the concerns expressed by Congress in both the NLRA and specific federal legislation involved. The states could not, therefore, go beyond the federal permission to establish basic protections for employees; for example, in light of the policies the Congress has followed thus far, state statutes limiting bargaining for greater protection would ordinarily find no sanction in federal legislation, nor would statutes which provide maximum rather than minimum standards be consistent with federal permission to legislate protection for employees as to any particular matter. Finally, if the states were to expand their regulation to create procedural impediments to bargaining, federal legislation of the kind surveyed could not be taken as permission to proceed, since each takes the form of substantive standards rather than procedural regulation of the bargaining process; the strong NLRA policy against state regulation of bargaining as such would then prevail. As this Court pointed out in *Oliver,* and reaffirmed in *Connell Co.* v. *Plumbers and Steamfitters,* 421 U.S. 616, under this standard there is, for example, no room for the state anti-trust laws:

"The use of state antitrust law to regulate union ac-

tivities in aid of organization must * * * be preempted because it creates a substantial risk of conflict with policies central to federal labor law. In this area, the accommodation between federal labor and antitrust policy is delicate. Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization, not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves. See *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469 (1940). State antitrust laws generally have not been subjected to this process of accommodation. If they take account of labor goals at all, they may represent a totally different balance between labor and antitrust policies. Permitting state antitrust law to operate in this field could frustrate the basic federal policies favoring employee organization and allowing elimination of competition among wage earners, and interfere with the detailed system Congress has created for regulating organizational techniques." (Id. at 635-636, footnote omitted.)

Thus, the general federal labor policy, composed both of the NLRA and of later substantive regulation, is best effectuated by giving effect to the federal-state relationship envisioned when the federal regulation was enacted, limiting state activity to setting substantive standards consistent with the federal labor policy, viewed as a whole.

As noted, Congress has now indicated its intent upon state regulation with regard to most of the important areas of state activity likely to affect collective agreements. Questions concerning the application of the *Oliver* rule to state statutes establishing protections for employees in areas where there is no indication that Congress is sanctioning state regulation are therefore unlikely to arise; there is, at

any rate, no need to address such questions to decide the present case—as we now show.

3. The WPPDA was the first direct foray by the federal government into the regulation of private employee benefit programs.[9] The Congress determined to limit the federal role at the outset to complete disclosure to participants of the terms of benefit plans and of relevant information on their operations. In part, this decision to proceed on a limited basis reflected a recognition of the complexity of the area, and a consequent desire to collect information on the operation of such plans before considering federal substantive regulation. (H.R. Rep. No. 2283, 85th Cong., 2nd Sess. (1958), in 1958 U.S. Code Cong. and Admin. News (hereinafter "H.R. Rep.") 4137, 4181). But the primary impetus for limiting the federal incursion into the area was the fact that the regulation of employee welfare plans was conceived to be "traditionally and primarily a state function." (Id. at 4187):

> "[T]he legislation proposed is not a regulatory statute. It is a disclosure statute and *by design endeavors to leave regulatory responsibility to the States.* A Federal disclosure statute, if properly coordinated with the States as the bill provides, could eliminate all but one disclosure report and leave insurance, trusts, and other detailed regulations to the States." (S. Rep. No. 1440, 85th Cong. 2nd Sess. (1958) p. 4153, emphasis supplied.)

The intent to permit state regulation of employee benefit plans was embodied in Section 10(b) of the Act, former 29 U.S.C. § 309(b):

[9] Section 302 of the Taft-Hartley Act, 29 U.S.C. Section 186, regulated collectively bargained benefit programs only to the limited degree of setting certain conditions upon union participation in the administration of plans funded through employer contributions.

"(b) Present or future Federal or State laws. The provisions of this chapter, except subsection (a) of this section, and any action taken thereunder, shall not be held to exempt or relieve any person from any liability, duty penalty, or punishment provided by any present or future law of the United States or of any State affecting the operation or administration of employee welfare or pension benefit plans, or in any manner to authorize the operation or administration of any such plan contrary to any such law.

It is important to note that the WPPDA not only *permitted* state regulation of employee benefit programs but was affirmatively intended to aid states in that function. Thus the statute was designed to be "administered in close cooperation with the States [so that it] could * * * be of great assistance to the states in carrying out their regulatory functions." (S. Rep., *supra,* at 4153.) In particular, Section 10(a) provided for the filing of reports required by the Act with state regulatory agencies in certain circumstances, "to permit coordination between the Federal and State Governments in carrying out their respective obligations." (S. Rep., *supra,* at 4168.).[10] And, while Congress was aware that state legislation until 1958 in the employee benefit field had been limited, one purpose of the Act was "to provide adequate information in disclosure legislation for possible later state * * * regulatory laws." (H.R. Rep. *supra,* at 4181.)

State power to regulate employee benefit plans was therefore central to the format of the WPPDA; the intent was not only to supplant whatever the states had done in the employee benefit area in the past, but to facilitate new approaches by the states in the future. Nor is there any possibility that WPPDA intended the state activity to be limited to non-collectively bargained plans. For, it was with regard to collectively bargained plans that Congress first became concerned about the protection of beneficiaries (S. Rep., *supra* at 4147), and the potential effect upon collective bargaining of expanded disclosure and regulation was [a] primary objection raised by opponents of the bill. (S. Rep., *supra,* at 4175 (Minority Views); H.R. Rep., *supra,* at 4203.) Moreover, with regard to the very termination problems Minnesota attempted to alleviate by the statute here under attack, Congress noted expressly that there is little difference in protection from detrimental termination between collectively bargained plans and other plans, because collective bargaining agreements can generally prevent termination or assure continued adequate contributions only during the period they are in effect; employees are protected only if "their union (is) able to renew the contract or negotiate a similar one upon its termination". (S. Rep., *supra,* at 4144). Thus, Congress intentionally drew no line at all between collectively bargained plans and other plans in the WPPDA, either with regard to the disclosure role of federal government or with regard to the state regulatory function. Only when, after sixteen years, the WPPDA experiment in federalism was declared a failure did Congress in ERISA enact plenary federal regulation and supersede state power in the employee benefit area.

[10] See also *id.* at 4160 (emphasis supplied): [The Act] is designed * * * to leave to the States the detailed regulations relating to insurance, trusts, and other phases of their operations, and, through cooperation with the States by furnishing information on said plans, to *assist them in this job* * * *."

The Court of Appeals, in the face of explicit statutory language and compelling legislative history, maintained

that "no warrant exists for construing this legislation to leave to a state the power to change substantive terms of pension plan agreements." (Pet. App. 21.) This conclusion both misconceives the legislation here under attack and appears to misread the relationship between federally mandated disclosure and state regulation established by Congress in 1958.

Aside from the other errors of the Court of Appeals, its characterization of the Minnesota act as working a "change" in the substantive terms of pension plan agreements is a misleading one. As Congress recognized when enacting the WPPDA, there is something of an internal inconsistency in a plan which at once sets out certain benefits which covered employees will receive upon retirement and at the same time contains no assurances either that the fund will be in existence when those employees retire or that it will have sufficient assets to pay promised benefits. (S. Rep., *supra*, at 4140).[11] Thus, a statute, such as the Minnesota one here at issue or the federal Pension Reform Act of 1974, which requires employers to assure in some fashion that upon termination of a pension plan the benefits promised will be paid is not really "changing" an agreement; it is, rather, nullifying unfair disclaimers in an agreement which otherwise appears affirmatively to promise

[11] Further, Congress noted that "collectively bargained agreements * * * are for short periods—usually from 1 to 5 years—and the employees whose rights do not mature within such contract period must rely upon the expectation that the union will be able to renew the contract or negotiate a similar one upon its termination." (S. Rep., *supra*, at 4144). Thus, Congress intentionally drew no line at all between collectively bargained plans and other plans in the WPPDA, either with regard to the disclosure role of the federal government or with regard to the state regulatory function.

benefits and providing a means for assuring that the benefits are in fact paid.[12] While the statute does regulate the agreement by prescribing which of several seemingly inconsistent provisions is to be effective, it does not "change" the agreement in the sense of creating obligations never undertaken at all.[13] Thus, contrary to the apparent impression of the court below, the Minnesota pension act is one which creates a "duty * * * affecting the operation or administration of employee * * * pension benefit plans"—namely, the duty to follow through upon promises apparently made by keeping the plan in operation and to refrain from relying upon unfair disclaimers to abnegate those promises by terminating the plan.

The Court of Appeals made an even more fundamental error when it concluded that:

> "neither this language nor statutory history suggests that Congress intended to regulate substantive provisions, performance of, or the funding of any employee benefit plan *or to authorize such regulation by the states.*" (Pet. App. 21, emphasis supplied.)

For, as the foregoing explanation of the WPPDA makes clear, while Congress did not intend *Federal* substantive

[12] The record in this case demonstrates that plan beneficiaries believed they had been promised benefits and detrimentally relied on that perceived promise. (App. 58, 62, 67, 71, 74).

[13] The Court of Appeals' perception that the agreement was "changed" may well have been influenced by the timing of the statute as it affected the White Motor Corporation pension plan: termination as of May 1, 1974 was already expected when the statute was enacted. As we develop in Part II of our argument, we do not believe that this sequence has any significance with regard to the effect of the WPPDA's permission to the states to regulate pension plans; as we note there, however, it is our position that considerations of timing are critical when the states act on their own and not pursuant to a Congressional permission.

regulation, a prime rationale underlying "the limited purpose of this legislation and * * * the (decision) not to affect substantive terms of employee benefit plans" (Pet. App. 21) was precisely the understanding that states *would* continue and expand such regulation, and that in doing so would be aided by the disclosure mandated by the Act.[14] Thus, the fact that the federal legislation was limited is not at all an indication that the permission to the states was also narrow; rather, the federal role was kept narrow in the hope that the states' activity protecting beneficiaries of employee pension plans would expand.

In short, applying the preemption principles stated above, and viewing the WPPDA against the background provided by the series of enactments already reviewed, we submit that while the Congressional intent as regards the extent of substantive state regulation is perhaps less clear than in the other federal statutes discussed earlier, on balance we believe the District Court was correct in concluding that the Congress intended to permit Minnesota to regulate provision terminations as it did, and that the Court of Appeals contrary conclusion was in error.

[14] Indeed, the attempt of the Court of Appeals to create a direct parallel between that which Congress undertook to do and that which the states were expected to do is based in part on the failure to recognize that even the limited substantive regulation in the Senate committee bill—that which provided "severe criminal sanctions for willful, false statements, the destruction of records, embezzlement, kick-backs, and other self-dealing"— (S. Rep., *supra*, 4157, quoted at Pet. App. 23). was not included in the final Act as passed in 1958. (See Pub. L. 85-836, 72 Stat. 997 *et seq.*). Criminal sanctions were added only in amendments to the Act passed in 1962. (See Pub. L. 87-420, 76 Stat. 34, 41-43). That Congress could not possibly have intended in 1958 to insulate from state prosecution the acts it determined not to make federal crimes is yet another indication that the area left to the states was much broader than the disclosure area Congress determined to federalize.

II. If this Court disagrees with our assessment of the impact of the WPPDA on this case, it will be constrained to approach directly the preemption problem presented here without the aid of specific Congressional indicia of intent. Even in that situation, however, there is no need to explore the broadest implications of *Oliver*. For, at the very least, *Oliver* holds—and there are compelling reasons for the holding—that in the absence of some Congressional indication to the contrary, the states may not alter at all the terms of existing collective agreements on mandatory subjects of bargaining.

That there is an important difference, in terms of conflict with basic NLRA presumptions, between state laws which serve as a backdrop to negotiations and those which have the effect of declaring a part of an agreement unlawful in mid-term can be seen from this case. Here, the statute resulting in a large financial liability was enacted only weeks before the collective agreement terminated.[15] The parties had no opportunity to take the potential liability into consideration when the bargain was struck, and it is possible that various provisions in the final agreement would have been very different had that liability been contemplated. Surely, this case would have had another cast had the state statute been in effect when the collective agreement was entered into. In that situation, the parties could have treated against the background of state law, taking the potential liability into account; while the resulting agreement would then be

[15] Petitioner's constitutional causes of action, which will remain in this case if the Court were to hold that the state law is not preempted (see Pet. App. 32-33), focus upon the questions raised by the timing of the state legislation.

greatly affected by state law, it at least would not be twisted fundamentally out of shape by a state enactment.

It is true, of course, that *federal* statutes can, and sometimes do, affect the substantive terms of collective agreements after they are negotiated. But experience demonstrates that the Congress can be expected, in establishing substantive regulations of the employment relationship, to take into account the effect upon federal labor policy; for example, federal statutes do sometimes contain a special delayed effective date where there are applicable collective agreements. (See, e.g., Section 4 of the Equal Pay Act of 1963.) The states, however, have no special responsibility for assuring the integrity of the bargaining process, and are unlikely to question the destructive effect of substantive regulation of existing agreements upon bargaining relationships and to balance that effect against the strength of the public policy furthered by the state regulation.

Thus, whatever question there may arise concerning *Oliver's* general application to protective state laws setting minimum employment standards, the precepts of that case must prevail when the state has legislated in a way that alters existing collective agreements. While we believe that the WPPDA is a sufficient indication of a Congressional intent to suspend operation of this rule, the judgment below should be affirmed on the narrower ground presented here if the Court disagrees with us as to the WPPDA's meaning.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed on the ground that the Welfare and Pension Plan Disclosure Act sanctions the Minnesota

law at issue here and the case remanded for determination of the constitutional issues. In the alternative, if the Court concludes that the WPPDA does not have such an effect, the judgment should be affirmed on the ground that in the absence of a contrary Congressional intent, statutes such as the one at issue here may not, consistent with the Supremacy Clause affect existing collective agreements.

Respectfully submitted,

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